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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Telecommunications and Information Society
Subject:	Data Act Regulation BG comments on 2nd compromise text

Delegations will find in the annex the BG comments on the 2nd compromise text on Data Act Regulation.

BG comments on second compromise proposal on DA
(document 14019/22)

Reference	Second compromise proposal	Drafting suggestion	Comment
			We support the overall purpose of the DA proposal and we appreciate all clarifications provided by the Commission during the discussions and we see the amendments made by the Presidency as generally positive, however, some of our comments and concerns expressed as regards the 1st compromise version still remain valid with this 2nd compromise version. Furthermore, although, we find the text of the proposal being more aligned with the GDPR (i.e. some definitions), more efforts should be put to avoid overlaps between the DA proposal and the GDPR as a whole and also in terms of better reflecting the opinion and relevant recommendations of the EDPB/EDPS, especially on Chapter VII. Also more alignment is necessary with the Data Governance Act and the Regulation on the free flow of non-personal data (FFNDR). Similarly to other MS we agree that a Q&A document prepared by the Commission addressing the main issues would be helpful to move forward on the file.

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Art.1	4a. This Regulation adds generally applicable obligations on cloud switching going beyond the self-regulatory approach of Regulation (EU) 2018/1807 on the free flow of non- personal data in the European Union.		We find the wording “going beyond” to be unclear and it is generally confusing how both regimes would co-exist in practice. More importantly, we need to better understand what would be the benefits of keeping the FFNDR existing in parallel if Data Act would go beyond and take over with similar but mandatory obligations.
Art.3	(3) ‘related service’ means a digital service, including software, which is at the time of the purchase, rent or lease agreement incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions;	(3) ‘related service’ means a digital service, including software, which is at the time of the purchase, rent or lease agreement incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its main functions;	It is necessary to limit the types of covered functions to the “main” ones otherwise the scope would be disproportionate because for example any mobile phone app helps it perform specific functions and respectively its absence would prevent performance of the specific function. We would like to avoid covering any third party after sale installed software because for example in those situations the original manufacturer has no control over it although it might relate to the functions of the product.
	(6) ‘data holder’ means a legal or natural person who - has the right or obligation, in accordance with this Regulation, applicable Union law or national		Although the amendments bring in more clarity we are still concerned that defining “data holder” but with a different meaning as compared to the Data Governance Act would create confusion. Moreover, there is still no

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	legislation implementing Union law, to make available certain data or - can enable access to the data in the case of non-personal data and through control of the technical design of the product and related services, the ability, to make available certain data or means of access, in the case of non-personal data;		practical understanding under the DGA as regards the “data holder” to better differentiate.
	(10) ‘public emergency’ means an exceptional situation such as public health emergencies, emergencies resulting from natural disasters, as well as human-induced major disasters, such as major cybersecurity incidents, negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s)	(10) ‘public emergency’ means an exceptional situation such as public health emergencies, emergencies resulting from natural disasters, as well as human-induced major disasters, such as major cybersecurity incidents, negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s) and which is determined according to the respective procedures under Union or national law;	The definition seems disproportionate and rather wide which creates a risk of a large number of potentially unsubstantiated requests for data which would be burdensome for the data holder. Moreover, the reference to Union or national law makes the scope even wider and difficult to apply and coordinate due to the great variety of sectorial legislation and practices without placing a proper mechanism for the necessary coordination between the different national authorities. This

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	and which is determined and officially declared according to the respective procedures under Union or national law;		proposal should provide for such coordination mechanism and not leave it to be solved by the sectorial legislation or through litigation which seems impractical. Furthermore, cybersecurity incidents and possible actions should be regulated in the cyber legislation (i.e. the Cyber Resilience Acts proposal).
	(14) 'functional equivalence' means the maintenance of a minimum level of functionality in the environment of a new data processing service after the switching process, to such an extent that, in response to an input action by the user on core elements of the service, the destination service will deliver the same output at the same performance and with the same level of security, operational resilience and quality of service as the originating service at the time of termination of the contract;	(14) 'functional equivalence' means the maintenance of a minimum level of functionality in the environment of a new data processing service after the switching process, to such an extent that, in response to an input action by the user on core elements of the service, the destination service will deliver the same output at the same performance and with the same level of security, operational resilience and quality of service as the originating service at the time of termination of the contract agreed between the customer and the service provider and the customer shall be informed in advance of the level of functionality and quality of the destination service;	In case that such "functional equivalence" would mean that any data processing service provider should immediately upgrade its services to an equivalent level when accepting a new customer that would be impractical and largely impossible. In practice, there is a great variety of offers on the market and the customer should be able to choose but of course being well informed of the level of service in advance. Therefore, a requirement for informing the customer of the level of service and for a possible lower level of service should be enough. Normally, the level of service is regulated by a contract and freely between the parties in respect of contractual freedom and competition regulations.
Art.4	1. Where data cannot be directly accessed by the user from the product or related service, the data holder shall	1. Where data cannot be directly accessed by the user from the product or related service, the data holder shall make available to the user the data	We welcome the amended para 1 and new definition of "readily available data", however, still on many occasions

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	make available to the user the data generated by its the use of a product or related service that are accessible readily available to the data holder, as well as the relevant metadata , without undue delay, free of charge, easily, securely, in a structured, commonly used and machine-readable format and, where applicable, of the same quality as is available to the data holder , continuously and in real-time. This shall be done on the basis of a simple request through electronic means where technically feasible.	generated by its the use of a product or related service that are accessible readily available to the data holder, as well as the relevant metadata when requested explicitly , without undue delay, free of charge, easily, securely, in a structured, commonly used and machine-readable format and, where applicable, of the same quality as is available to the data holder , continuously and in real-time. This shall be done on the basis of a simple request through electronic means where technically feasible.	providing the relevant metadata would slow down the entire process and we suggest that it should be treated differently. Therefore, it should be conditioned upon explicit request and not by default.
Chapter III			Although we have been presented a preview by the Commission of the results as regards the prepared study on “reasonable compensation” we are still not in a position to fully assess the text of the proposal in this part until the study is officially published and we may have a complete review and the effects.
Chapter V	CHAPTER V {MAKING DATA AVAILABLE TO PUBLIC SECTOR BODIES, AND UNION INSTITUTIONS, AGENCIES THE COMMISSION, THE EUROPEAN CENTRAL BANK OR		The scope of this chapter still seems to be rather wide and allowing multiple public bodies at national and EU level to request data under this mechanism which might have a negative effect and eventually impossible to coordinate and adequately supervise.

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	UNION BODIES BASEDON EXCEPTIONAL NEED}		
Art.14	1. Upon request, a data holder shall make data, which could including relevant metadata , available to a public sector body or to a Union institution, agency or body the Commission, the European Central Bank or Union bodies demonstrating an exceptional need to use the data requested in order to carry out their legal competencies statutory duties in the public interest .	1. Upon request, a data holder shall make data, which could including relevant metadata if requested explicitly , available to a public sector body or to a Union institution, agency or body the Commission, the European Central Bank or Union bodies demonstrating an exceptional need to use the data requested in order to carry out their legal competencies statutory duties in the public interest .	We believe that meta data should be provided upon explicit request and not by default with other data for the reasons already stated above.
	2. This Chapter shall not apply to small and micro enterprises as defined in Article 2 of the Annex to Recommendation 2003/361/EC.		On many occasions SMEs would hold valuable data and such an exception seems disproportionate. Additional criteria should apply depending on the type or volume of data, etc.
Art.15	<i>Article 15</i> <i>Exceptional need to use data</i> An exceptional need to use data within the meaning of this Chapter shall be limited in time and scope and		We find the entire notion of “exceptional need” to be disproportionate and rather wide and especially in combination with the definition for “public emergency” which on its turn is also wider than necessary as already pointed out in our comments above. Normally, this mechanism should be available to bodies and institutions traditionally involved and responsible for emergency situations.

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	deemed to exist only in any of the following circumstances: (a) where the data requested is necessary to respond to a public emergency; (b) where the data request is limited in time and scope and necessary to prevent a public emergency or to assist the recovery from a public emergency; or (c) where the lack of available data prevents the public sector body, or Union institution, agency or body the Commission, the European Central Bank or Union bodies from fulfilling a specific task in the public interest, such as official statistics, that has been explicitly provided by law; and		

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	(1) the public sector body or Union institution, agency or body the Commission, the European Central Bank or Union body has exhausted all other means at its disposal has been unable to obtain such data by alternative means, including, but not limited to, by purchasing ing of the data on the market at by offering market rates or by relying on existing obligations to make data available, and or the adoption of new legislative measures which could guarantee cannot ensure the timely availability of the data; or (2) obtaining the data in line with the procedure laid down in this Chapter would substantively reduce the administrative burden for data holders or other enterprises.		
Art.20	2. Where the data holder claims compensation for making data available in compliance with a request made pursuant to Article 15, points (b) or (c), such compensation shall not exceed the technical and organisational costs incurred to comply with the request including, where necessary, the costs of		On many occasions it would be difficult to determine the “reasonable margin” for the purpose of this paragraph.

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	anonymisation, pseudonymisation and of technical adaptation, plus a reasonable margin. Upon request of the public sector body or the Union institution, agency or Commission, the European Central Bank or Union body requesting the data, the data holder shall provide		
Art.21	<i>Article 21</i> <i>Further sharing of data obtained in the context of exceptional needs with</i> <i>Contribution of research organisations or statistical bodies in the context of exceptional needs</i>		In consideration of the latest discussion on this article in the WP TIS Bulgaria believes that the matter is quite specific and should be regulated in the sectoral legislation and not with the Data Act. However, should a majority of MS favor another approach we would insists that the GDPR regime and practice are followed and complied with to avoid any confusion when it comes to limitation of purpose, erasure of data, etc.
Chapter VI			We appreciate the amendments within the chapter, however, we believe that the contractual freedom especially when it comes to the periods should be strengthened which would provide the necessary flexibility for the parties to arrange for adequate terms and the specificities of the various types of (cloud) services (incl. SaaS, IaaS, PaaS).

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Art.23	<i>Article 23</i> <i>Removing obstacles to effective switching between providers of data processing services</i>	<i>Article 23</i> <i>Removing obstacles to effective switching</i> <i>between providers of data processing services</i>	“Effective switching” is enough to describe the main purpose of this article. This way the title of the article and the text of para 1 of the same article would be more consistent where “remove” has been deleted and “obstacles” seems obsolete.
Para 1 (c)	(c) porting its data and metadata created by the customer and by the use of the originaing service, and/or the customer’s applications and/or other digital assets to another provider of data processing services or to an on-premise system;	(c) porting its data and if explicitly requested metadata created by the customer and by the use of the originaing service, and/or the customer’s applications and/or other digital assets to another provider of data processing services or to an on-premise system;	
Art.25	<i>Article 25</i> <i>Gradual withdrawal of switching charges</i>		In consideration of the recent discussions in WP TIS and the “switching charges” we believe that they should be more transparent and we would not object to more granularity in this respect and include/defining the “data egress charges” not only as a recital which might not suffice.
Chapter VII	CHAPTER VII UNLAWFUL INTERNATIONAL GOVERNMENTAL ACCESSAND TRANSFER OF CONTEXTS NON- PERSONAL DATA SAFEGUARDS		We find the amendments as regards this chapter to be positive, however, the overall interplay with the GDPR needs to be further clarified and the recommendations of the EDPB/EDPS should be better reflected and by all means unjustified blocking of data transfers should be avoided (i.e. when

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			personal and non-personal data are inextricably linked). Specifically, the recommendation of the EDPB/EDPS to avoid touching upon the notion of “transfer” in the Data Act proposal as that notion has a very specific meaning in the GDPR context.
Chapter X	<i>Article 35</i> <i>Databases containing certain data</i> In order not to hinder the exercise of the right of users to access and use such data in accordance with Article 4 of this Regulation or of the right to share such data with third parties in accordance with Article 5 of this Regulation, [For the purposes of the exercise of the rights provided for in Articles 4 and 5 of this Regulation, the sui generis right provided for in Article 7 of Directive 96/9/EC does shall not apply to databases containing data when data is obtained from or generated by a product or related service.] OR [The sui generis right provided for in Article 7 of Directive 96/9/EC does shall not apply to databases containing data when data is obtained from or generated by the use of a product or a related service.]	<i>Article 35</i> <i>Databases containing certain data</i> In order not to hinder the exercise of the right of users to access and use such data in accordance with Article 4 of this Regulation or of the right to share such data with third parties in accordance with Article 5 of this Regulation, [For the purposes of the exercise of the rights provided for in Articles 4 and 5 of this Regulation, the sui generis right provided for in Article 7 of Directive 96/9/EC does shall not apply to databases containing data when data is obtained from or generated by a product or related service.] OR [The sui generis right provided for in Article 7 of Directive 96/9/EC does shall not apply to databases containing data when data is obtained from or generated by the use of a product or a related service.]	Bulgaria has already on several occasions supported the opinion of the Council Legal Service on the matter which favors Option 1 and keeping the text more related to the essence of the proposal itself. However, such a preference is conditional upon the possibility to amend Directive 96/9/EC itself which would have been our preferred option but seems not planned by the Commission at this stage.

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Chapter XI			
Art.42	It shall apply from [12 months after the date of entry into force of this Regulation]. The obligation resulting from Article 3(1) shall apply to products and related services placed on the market after [12 months] after the date of application of this Regulation.	It shall apply from [2412 months after the date of entry into force of this Regulation]. The obligation resulting from Article 3(1) shall apply to products and related services placed on the market after [2412 months] after the date of application of this Regulation.	In general, we believe that the periods under the article should be extended to allow both the public bodies and the obliged subjects to adapt to the new regime.

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